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No. 03-987

In The

Supreme Court of the United States

JON F. KIDNEIGH
and
BARBARA KIDNEIGH,

Petitioners,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state bad faith law coming within ERISA's saving clause, 29 U.S.C. § 1144(b)(2)(a), is subject to the doctrine of conflict preemption; and

2. Whether Colorado's bad faith law satisfies the criteria, newly established in *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 123 S. Ct. 1471 (2003), to come within ERISA's saving clause.

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OPINIONS BELOW

The Tenth Circuit Court of Appeal's opinion was reported at 345 F.3d 1182 (2003), and is reprinted in Appendix A, at App. 1. The May 1, 2002 Order of the District Court for the District of Colorado is reprinted in Appendix B, at App. 36. This Order was not reported.

JURISDICTION

The Tenth Circuit entered judgment on October 3, 2003, and entered its Order denying the Kidneighs' Petition for Rehearing En Banc on October 28, 2003. This Order is reprinted in Appendix C, at App. 42. This Court has jurisdiction to review the Tenth Circuit's judgment on a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions contained within the Employee Retirement Income Security Act of 1974 ("ERISA").

29 U.S.C. § 1144(a) – ERISA's Preemption Clause

> Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) of this title and not exempt under section 4(b) of this title. This section shall take effect on January 1, 1975.

29 U.S.C. § 1144(b)(2)(A) – ERISA's Saving Clause

> Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

29 U.S.C. § 1144(b)(2)(B) – ERISA's Deemer Clause

> Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

STATEMENT OF THE CASE

The facts as set forth in this Statement of the Case are, unless otherwise noted, taken from the Tenth Circuit's opinion. App. 1-3.

Mr. Kidneigh was disabled from working as an attorney and UNUM paid disability benefits through March 31, 1999 under an insurance policy governed by ERISA. Thereafter, UNUM paid no benefits although Mr. Kidneigh claimed continued disability to January 1, 2001. 1 Aplt. App. at 10, 50. Mr. Kidneigh filed a complaint seeking recovery as provided for by 29 U.S.C. §§ 1132(a)(1)(B) and (g) of ERISA. He also asserted that UNUM, in not timely

making benefit payments and in denying benefits, had acted in bad faith under Colorado law. Mrs. Kidneigh claimed a loss of consortium due to UNUM's bad faith handling of her husband's disability claim.

With respect to his bad faith claim, Mr. Kidneigh contended that UNUM had terminated benefits, even though he was indisputably disabled, because UNUM had in place a comprehensive scheme to utilize ERISA to unreasonably delay and deny disability benefits with respect to its insureds nationwide, regardless of the merits of any individual's claim. 2 Aplt. App. at 455. In support, Mr. Kidneigh referenced a company analysis which stated:

> A task force has recently been established to promote the identification of policies covered by ERISA and to initiate active measures to get new and existing policies covered by ERISA. The advantages of ERISA coverage in litigious situations are enormous: state law is preempted by federal law, there are no jury trials, there are no compensatory or punitive damages, relief is usually limited to the amount of benefit in question, and claims administrators may receive a deferential standard of review. The economic impact on Provident [UNUM's sister company] from having policies covered by ERISA could be significant. As an example, Glenn Felton identified 12 claim situations where we settled for $7.8 million in the aggregate. If these 12 cases had been covered by ERISA, our liability would have been between zero and $0.5 million.

2 Aplt. App. at 512-514.

Furthermore, a memo from UNUM's head of claims to its CEO estimated that changing "from a claim payment to a claim management approach" will save $30-60 million

each year. 2 Aplt. App. at 515. To this end, UNUM's performance objectives targeted an 84-90% net termination of disability claims. *Id.* at 516-517.

In applying this comprehensive scheme to his case, Mr. Kidneigh noted that UNUM had considered him disabled prior to two unsuccessful back surgeries, but had concluded that somehow he had miraculously recovered after undergoing what UNUM admitted to be an unsuccessful second surgery, which in turn necessitated a third surgery, more than a year after benefits had stopped, involving a fusion and cage insertion for a collapsed disc. 2 Aplt. App. at 454-455.

UNUM moved to dismiss Mr. Kidneigh's bad faith claim and Mrs. Kidneigh's loss of consortium claim on grounds they were preempted by ERISA. The district court denied the motion with respect to Mr. Kidneigh, yet granted it as to Mrs. Kidneigh. The district court certified the issue for interlocutory appeal and the Tenth Circuit took jurisdiction under 28 U.S.C. § 1292(b). The court of appeals ruled that regardless of whether Colorado's bad faith law came within ERISA's saving clause, there was preemption of both the bad faith and loss of consortium claims under the doctrine of conflict preemption. By a 2 to 1 vote the court of appeal's panel also held that Colorado's bad faith law did not come within ERISA's saving clause to avoid express preemption under ERISA's preemption clause. Accordingly, the court of appeals reversed the district's court's decision as to Mr. Kidneigh and affirmed as to Mrs. Kidneigh.

REASONS THIS PETITION SHOULD BE GRANTED

This Court has never been called upon to decide whether the doctrine of conflict preemption applies to preempt a state bad faith law that actually fits within ERISA's saving clause. However, in dicta this Court has offered that if a state law did come within the saving clause, it would be subject to conflict preemption. Because this result does not make sense in view of the rationale this Court gave in justification for conflict preemption, and because of the harm ERISA preemption has caused employee/insureds, it is submitted that there is a compelling reason for the Court to grant this Petition for a Writ of Certiorari. That the issues raised in this case impact millions of employees whose insurance is governed by ERISA, as well as call into question the extent to which the states will be able to exercise their historic police powers over insurance, further emphasize the compelling necessity for the Court to hear this case.

I. Preemption of a State Law Bad Faith Claim Does Not Make Sense in the Context of the Rationale Supporting this Court's Dicta for Preemption of Such Laws under the Conflict Preemption Doctrine

This Court has never held that a state bad faith law coming within ERISA's saving clause is subject to preemption under the conflict preemption doctrine because it provides for an extra-ERISA remedy. Nevertheless, in *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 377 (2002), this Court stated in dicta:

> Although we have yet to encounter a forced choice between the congressional policies of

> exclusively federal remedies and the "reservation of the business of insurance to the States," [cite omitted] we have anticipated such a conflict, with the state insurance regulation losing out. . . .

The rationale the Court gave in support for this dicta follows:

> Any such provision patently violates ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred.

Id. at 379.

Applying conflict preemption under this rationale to Colorado's bad faith law would be illogical because Colorado's law has absolutely no effect on whether employers will provide and maintain benefits for employees. This is because employers cannot be liable in bad faith under ERISA. This Court held in *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), that while state laws regulating insurance are saved and can be applied against insurers, they cannot be applied to employers of self-funded plans since employers are not insurers pursuant to ERISA's deemer clause. Thus, this Court observed:

> The saving clause returns to the States the power to enforce those state laws that "regulate insurance," except as provided in the deemer clause. Under the deemer clause, an employee benefit plan governed by ERISA shall not be "deemed" an insurance company, an insurer, or

> engaged in the business of insurance for purposes of state laws "purporting to regulate" insurance companies or insurance contracts.

Id. at 58.

Therefore, holding insurers liable for the bad faith handling of employee claims under Colorado law will in no way discourage employers from purchasing an employee benefit, or cause them to discontinue a plan or reduce a benefit. This is because employers bear no risk of liability for insurer bad faith and cannot be liable for acting in bad faith in their own right.

Nor will insurers pass on bad faith costs to their employer customers resulting in employer unwillingness to provide benefit plans, or the purchase of reduced benefits. First, any argument to the contrary defies nearly two decades of case law uniformly holding that bad faith laws do not spread risk. *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987); *Kelley v. Sears, Roebuck & Co.*, 882 F.2d 453, 456 (10th Cir. 1989). Second, an insurer cannot pass on bad faith costs because it is in competition with other insurers, meaning employers would have the option of purchasing benefits from carriers selling policies at lower rates because they had not acted in bad faith. Third, the market determines what benefits will be provided, so that employers will provide benefits as needed to compete for the employees they require to operate their businesses.

On the other hand, Colorado's law actually furthers ERISA's purpose of encouraging employers to provide benefits because employers will know their employees will stand a better chance of receiving benefits when insurers understand they risk being held liable for wrongfully

denying claims. Also, employers will not have to deal with deflation of morale when their employees come to conclude that because their insurer is willing to act in bad faith, benefits are simply illusory.

II. This Court's Dicta in Support of Conflict Preemption Has Harmed the Very Employees ERISA was Enacted to Protect

This idea that there exists a super preemption doctrine, that acts to preempt an otherwise saved law, comes from *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). In *Pilot Life*, this Court had held that ERISA preempted Mississippi's bad faith law because it did not fit within the saving clause. Despite this holding, this Court went on to unnecessarily opine that Mississippi's law would be subject to conflict preemption even if it had come within the saving clause since it allowed for an extra-ERISA remedy. *Id.* at 52-57. The result has been a rampant, unconscionable denial of employee benefits by insurers over the succeeding 16 years. In fact, UNUM's own conduct towards Mr. Kidneigh in furtherance of its national plan to wrongfully deprive insureds of benefits is emblematic of the bad faith acts an insurer will commit when it knows it will not suffer economic consequences in the form of bad faith liability.

Thus, it has been said that ERISA preemption serves as "a shield of immunity which thwarts the legitimate claims of the very people it was designed to protect." *Andrews-Clarke v. Travelers Ins. Co.*, 984 F.Supp. 49, 56 (D. Mass. 1997). *See also Cathey v. Metropolitan Life Ins. Co.*, 805 S.W.2d 387, 392 (Tex. 1991) (Doggett, J., concurring) ("a statutory addition to worker's rights has been

converted into a statutory removal of those rights" enabling "the companies targeted by Congress [to] employ ERISA as an effective shield against responsibility for wrongful processing of claims"); Bogan, *Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States to Regulate Managed Care*? 74 Tul. L. Rev. 951, 1002-1003 (2000) ("[t]he anticonsumer effects of the preemption of state-law remedies . . . cannot be overstated").

Recognizing the damage wrought, courts have long bemoaned the harshness of ERISA preemption and their inability to do anything about it. *See* Bogan, *Protecting Patient Rights* at 1018 (citing several cases at 1018 n.332). An example of this can be found in *Dishman v. Unum Life Ins. Co. of America*, 1997 U.S. Dist. LEXIS 22676 (C.D. Cal.), where the court observed that the insurer's "decision to suspend payments was made on such clearly pre-textual bases, that it is impossible to avoid the conclusion that it [was] made in bad faith," *id.* at *33, and added, at *29:

> [T]he facts of this case are so disturbing that they call into question the merit of the expansive scope of ERISA preemption. UNUM's unscrupulous conduct in this action may be closer to the norm of insurance company practice than the Court has previously suspected. This case reveals that for benefit plans funded and administered by insurance companies, there is no practical or legal deterrent to unscrupulous claims practices. Absent such deterrents, the bad faith denial of large claims, as a strategy for settling them for substantially less than the amount owed, may well become a common practice of insurance companies.

In *Suggs v. Pan Am. Life Ins. Co.*, 847 F.Supp. 1324, 1355 (D. Miss. 1994), the court noted "that no where does ERISA state an intent to protect" insurers and that "it is incongruous to place so much emphasis on the intent of Congress in regard to preemption, which is only one part of ERISA and not to be equally concerned about Congress' intent as to the overall purpose of the bill," to protect employees. So, the court observed, it had seen insurers deny claims due to greed "simply because there was no perceived exposure or downside to denying the claim under their perception of ERISA and how it would be interpreted by the Courts." *Id.* at 1357.

The *Suggs'* court then expressed its frustration:

> The overriding purpose of the judiciary is to provide justice. When Congress passes legislation and clearly sets out the purposes and intentions of such legislation, "to protect . . . the interests of participants in private pension plans and their beneficiaries," and Courts acknowledge that ERISA "is a comprehensive statute designed to promote the interests of employees and their beneficiaries," and yet the Courts have to say . . . ERISA's preemption may leave a victim of fraud or misrepresentation without a remedy, something is wrong.

Id.

Similarly, in *Andrews-Clark v. Travelers Ins. Co.*, 984 F.Supp 49, 53 (D. Mass. 1997) (death from failure to preapprove obviously needed care), the court stated:

> Enacted to safeguard the interests of employees and their beneficiaries, ERISA has evolved into a shield of immunity that protects health insurers, utilization review providers, and other managed

> care entities from potential liability for the consequences of their wrongful denial of health benefits.

Just recently, Judge Becker of the Third Circuit voiced similar concerns in his concurring opinion in *Defelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 2003 U.S. App. LEXIS 20942, **31-32, saying:

> ERISA has evolved into a shield that insulates HMOs from liability for even the most egregious acts of dereliction committed against plan beneficiaries, a state of affairs that I view as directly contrary to the intent of Congress. Indeed, existing ERISA jurisprudence creates a monetary incentive for HMOs to mistreat those beneficiaries, who are often in the throes of medical crises and entirely unable to assert what meager rights they possess.

In the following in depth analysis, Judge Becker further dissected the problems associated with ERISA preemption, which although provided in the context of an HMO's denial of medical care, applies equally well to a disability carrier's denial of benefits:

> The unavailability of extracontractual damages has effects that are perverse. First, as stated above, contingency fees are rendered entirely impractical – precious few lawyers would be willing to undertake a horrendously complex case of uncertain outcome when the greatest potential reward is merely provision of the care that had been contractually promised. * * * *
>
> The second perverse effect is that, at the same time as ERISA makes it inordinately difficult to bring an injunction to enforce a participant's rights, it creates strong incentives for HMOs to

> deny claims in bad faith or otherwise "stiff" participants. ERISA preempts the state tort of bad-faith claim denial, *see Pilot Life, 481 U.S. at 54-56*, so that if an HMO wrongly denies a participant's claim even in bad faith, the greatest cost it could face is being compelled to cover the procedure, the very cost it would have faced had it acted in good faith. Any rational HMO will recognize that if it acts in good faith, it will pay for far more procedures than if it acts otherwise, and punitive damages, which might otherwise guard against such profiteering, are no obstacle at all. Not only is there an incentive for an HMO to deny any particular claim, but to the extent that this practice becomes widespread, it creates a "race to the bottom" in which, all else being equal, the most profitable HMOs will be those that deny claims most frequently.
>
> In sum, ERISA's remedial scheme gives HMOs every incentive to act in their own and not in their beneficiaries best interest while simultaneously making it incredibly difficult for plan participants to pursue what meager remedies they possess, a confounding result for a statute whose original purpose was to protect employees.

Id., 2003 U.S. App. LEXIS 20942, **47-49.

So, although the contention that harm to employees from state law bad faith claims, in the form of such claims discouraging employers from purchasing benefit plans, has been shown to be speculative and illogical, one thing is certain and that is that when insurers are immunized from accountability for bad faith acts, employees will not receive the protection of their benefits which is ERISA's cornerstone. Accordingly, this Court has been presented with a compelling reason to hear this case in order to

determine whether preemption of a state law bad faith claim benefits employees, or whether, in truth, conflict preemption has just the opposite effect of causing immense harm to the very employees ERISA was enacted to protect. In this regard, it must be noted that if this Court does not decide this issue, the circuit courts will continue to hold based on this Court's *Rush* dicta, as the Tenth Circuit did in this case, App. at 5-7, that state bad faith laws are preempted under the conflict preemption doctrine regardless of whether they come within the protection of the saving clause. *See Elliot v. Fortis Benefits Ins. Co.*, 337 F.3d 1138, 1146-1148 (9th Cir. 2003); *Fink v. Dakotacare*, 324 F.3d 685, 688-689 (8th Cir. 2003).

III. Application of Conflict Preemption to a State Law Coming Within the Saving Clause Is Inconsistent with Congress's Intent

Because conflict preemption of state laws providing for extra-ERISA remedies has undermined Congress's intent to protect employees, there is a compelling need for this Court to re-evaluate its dicta favoring conflict preemption in the context of basic rules of statutory construction, the development of this dicta through dependence upon dissimilar legislation, and ERISA's underpinnings as a pension reform bill not an insurance regulation act.

A. Conflict Preemption Conflicts with Rules of Statutory Construction

ERISA's saving clause mandates that "**nothing** in this title shall be construed to exempt or relieve any person from **any law** of any State which regulates insurance." 29 U.S.C. 1144(b)(2)(A) (emphasis added). The saving clause

immediately follows ERISA's preemption clause, meaning that Congress was well aware of the preemption clause and ERISA's remedial scheme, 29 U.S.C. § 1132, when it inserted a saving clause purporting to reserve absolute power to the states to regulate insurance. Being so aware, had Congress truly intended for ERISA's remedies to be comprehensive and exclusive, Congress would have written an express exception into the saving clause exempting from saving clause protection state laws providing for extra-ERISA remedies. Instead, Congress did just the opposite and wrote an express exception into ERISA's preemption clause stating that ERISA shall preempt all state laws "[e]xcept as provided in subsection (b)," meaning ERISA shall preempt all state laws except for those state laws coming within the saving clause.

This Court has observed that effect must be given to a statute's plain language. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). Here, the plain language of the saving clause says "nothing" shall override "any law of any state" regulating insurance. "Nothing" means "nothing." It does not mean "nothing, except that ERISA's preemption clause can override State law." "Any law" means "any law," not "any law except for a State law that allows for remedies beyond those remedies provided for by ERISA." Thus, implementation of this Court's dicta in support of conflict preemption so as to find that ERISA preempts a state's bad faith law, even though it fits within the saving clause, amounts to this Court inserting its own terms into the statute. The effect would be to so contravene and diminish this statute's plain language as to usurp Congress's right to have the legislation it enacts enforced. *Bates v. United States*, 522 U.S. 23, 29 (1997) (Court should "resist reading

words or elements into a statute that do not appear on its face").

This Court has also recognized that the breadth of the saving clause is as extensive as the preemption provision, *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 363 (1999), and has said it "makes scant sense" to argue a law is preempted even though it fits within the saving clause. *Id.* at 375. These observations are consistent with *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 741 (1985) (no preemption of state law requiring minimum mental health coverage in policies), where this Court declared: "The presumption is against pre-emption, and we are not inclined to read limitations into federal statutes in order to enlarge their pre-emptive scope."

Similarly, this Court has stated:

> We have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. Indeed, in cases . . . where federal law is said to bar state action in fields of traditional state regulation, we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

The problem with this Court's dicta favoring conflict preemption is that it elevates a preemptive plan that can

at best be implied into ERISA over the saving clause's express language and extensive scope, even though there is an express exception in the preemption clause in favor of the saving clause. This is the case despite the presumption against preemption and the lack of any clear indication from Congress that such a preemptive scheme was intended to supersede the saving clause's plain language. For these reasons Judge Newcomer declined to follow this court's dicta in *Rosenbaum v. UNUM Life Ins. Co. of Am.*, 2003 U.S. Dist. LEXIS 15652, *23 (E.D. Pa.), stating:

> The *Pilot Life* and *Rush* holdings present an implied Congressional intent which flatly contradicts this express intent. Rather than allowing any state law which "regulates insurance" to survive ERISA preemption, this implied intent adds an additional requirement, that is, the law must not offer a remedy which is not listed under *§ 502(a)*. The problem with such a requirement is that the Courts have taken an implied intent, which was derived by questionable means, and have interpreted that implied intent to overrule Congress' express intent, as reflected in the saving clause.

Finally, this Court must look "to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *New York State Conference of Blue Cross & Blue Shield Plans*, 514 U.S. at 656. *See also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113-114 (1989) (Court rejects "reading of ERISA [that] would afford less protection to employees and their beneficiaries than they enjoyed before ERISA"). Because conflict preemption encourages insurers to run roughshod over the employees ERISA was meant to protect, it runs counter to ERISA's purpose and so provides employees

with significantly less protection than they had before ERISA. On the other hand, Colorado's bad faith law is in perfect step with Congress's desire to safeguard employees, and nothing in the statute's language, the purposes underlying ERISA, or its legislative history supports a contrary conclusion. Accordingly, there is no basis for construing ERISA so that a saved law is subject to conflict preemption.

B. Conflict Preemption Derives from Dissimilar Legislation

That this Court arrived at its dicta in support of conflict preemption by "questionable means" is demonstrated by the *Pilot Life* Court's heavy reliance on the Labor Management Relations Act, 1947, 29 U.S.C. § 185 (hereinafter LMRA), wherein the Court noted that ERISA preemption was "modeled on the exclusive remedy provided by § 301" of the LMRA. *Pilot Life*, 481 U.S. at 52. However, it is difficult to envision how this citation to the LMRA can have any bearing on a law that falls within the saving clause. The LMRA has no saving clause and thus is not comparable legislation when addressing a law that fits within ERISA's saving clause. *Cf. Firestone Tire & Rubber Co.*, 489 U.S. at 109-110 ("LMRA principles offer no support for the adoption of the arbitrary and capricious standard [of review of fiduciary's decision] insofar as [ERISA] is concerned" because unlike ERISA, employee may not bring suit against fiduciary under LMRA).

Moreover, while the LMRA comprehensively regulates the field of labor relations, ERISA contains virtually no regulation of insurance. Indeed, this Court has said:

> The phrasing of § 502 [ERISA's remedial provision] is instructive. It does not purport to reach every question relating to plans covered by ERISA . . . Furthermore, § 514(b)(2)(A) of ERISA [the saving clause] makes clear that Congress did not intend to preempt entirely every state cause of action relating to such plans. With important, but express limitations, it states that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." In contrast, § 301(a) of the LMRA applies to all "suits for violation of contracts between an employer and a labor organization representing employees in an industry effecting commerce . . . or between any such organization."

Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 25 (1983).

C. Congress Never Intended ERISA's Enforcement Scheme to Preclude State Regulation of Insurance Through Bad Faith Law

ERISA was enacted as a pension reform bill intended to protect worker retirement benefits. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983); 29 U.S.C. § 1001a; 29 U.S.C. § 1001b. With this in mind, there is an illuminating law review article by Donald T. Bogan, *Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States To Regulate Managed Care?* 74 Tul. L. Rev. 951 (2000) (hereinafter, Bogan, *Protecting Patient Rights*), demonstrating that ERISA was never intended to comprehensively regulate nonpension employee benefits in any way, including by way of remedies, and that this explains

why the saving clause was enacted to leave the full gamut of state laws regulating insurance free from preemption.

Professor Bogan observed that legislative history reveals that abuses in the pension industry led to ERISA's enactment "to comprehensively reform the private pension industry." *Id.* at 964, 967 n.7. *See also Taggart Corp. v. Life and Health Benefits Admin., Inc.*, 617 F.2d 1208, 1211 (5th Cir. 1980); *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 56 n.29 (D. Mass. 1997). Consequently, ERISA's major substantive provisions – *e.g.*, provisions dealing with funding, protection against insolvency, vesting, and protection of workers in cases of insolvency – apply only to pension plans. Bogan, *Protecting Patient Rights* at 974-975. On the other hand, Professor Bogan demonstrates that "ERISA's legislative history provides no evidence that Congress seriously investigated, studied, or debated any issues or concerns with nonpension employee benefit plans." *Id.* at 972.

> There is no documentation anywhere in ERISA's legislative history of any study or investigation of the history or growth of nonpension employee benefit plans, or of any specific concern with the management of nonpension plan assets. Further, ERISA's legislative history fails to disclose any concerted investigation of any complaints about nonpension benefits, such as inadequate health care, accident, death, or disability coverage, or problems with health, life or disability benefits claims. In short, Congress just was not dealing with nonpension benefit plans when it enacted ERISA.

Id. at 976-977. Thus, Professor Bogan notes that "[w]hile it is true that portions of ERISA apply to nonpension benefit plans, the statute certainly does not provide a complete

and coordinated network of rules to govern nonpension employee benefits." *Id.* at 973. *See also id.* at 956, 958.

However, state law does provide substantial regulation of insurance, where ERISA does not. Citing *Metropolitan Life*, 471 U.S. at 727-32, Professor Bogan noted that "unlike prevailing state law that commonly dictates the terms of insurance policies, regulates insurance company claims practices, and provides regulatory protections against insurance company insolvency," there was no ERISA regulation at all relating to these insurance matters. Bogan, *Protecting Patient Rights* at 990. Thus, it should be of no surprise that there exists no

> legislative history addressing Conference Committee action indicating any intent to displace state laws regulating the predominant nonpension employee benefits such as health care and disability.

Id. at 982 n.139.

In fact, Professor Bogan maintains that the only reason ERISA regulates nonpension plans at all is because it was introduced as a bill to amend the Welfare and Pension Plan Disclosure Act, 29 U.S.C. §§ 301-309 (repealed 1974), whose disclosure requirements applied to all employee benefit plans. *Id.* at 977 n.124. So, Professor Bogan reasons that if courts were to accept

> [t]his new ERISA super-preemption doctrine [it would] create[] a glaring void in the field of welfare plan regulation because ERISA, with its detailed focus on pension issues, does not replace preempted state laws in the field of welfare benefit plans with any substantive federal regulation.

Id. at 986. As such, conflict preemption would be "inconsistent with the scope of ERISA's substantive regulations, which pertain only to pension plans, and with the statute's comparatively modest objective of protecting workers' rights to their pension benefits." *Id.* at 955.

In view of this, Professor Bogan concludes that in enacting the saving clause, Congress intended to confine preemption to pension plans "because ERISA provides a pervasive and coordinated regulatory scheme to govern pension plans and because the field of pension regulation does not have strong state-law roots." *Id.* at 957. This conclusion, considered in the context of a dearth of ERISA substantive regulation of insurance, is consistent with this Court's observation that the saving clause was made part of ERISA to preserve and continue the long held right the McCarran-Ferguson Act gave to the states to regulate the business of insurance in all respects. *Metropolitan Life*, 471 U.S. at 744 n.21.

IV. Colorado's Bad Faith Law Satisfies the *Miller* Test to Come Within ERISA's Saving Clause

In *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 123 S. Ct. 1471, 1479 (2003), this Court eliminated the McCarran-Ferguson factors from consideration on the issue of whether a state law comes within ERISA's savings clause, stating:

> Today we make a clean break from the McCarran-Ferguson factors and hold that for a state law to be deemed a "law . . . which regulates insurance" under §1144(b)(2)(A), it must satisfy two requirements. First, the state law must be specifically directed toward entities engaged in insurance. See *Pilot Life, supra*, at 50, *UNUM*,

> *supra*, at 368, *Rush Prudential*, *supra*, at 366. Second, as explained above, the state law must substantially affect the risk pooling arrangement between the insurer and the insured.

Analysis demonstrates that Colorado's bad faith law meets the two *Miller* requirements to come within ERISA's saving clause, and so avoid preemption. Yet, the Tenth Circuit's panel majority insisted upon utilizing the McCarran-Ferguson factors in finding that Colorado's law did not satisfy the saving clause. Because the Tenth Circuit is not alone in this regard, *see Leuthner v. Blue Cross and Blue Shield of Northeastern Pennsylvania*, 270 F. Supp. 2d 584, 593-594 (M.D.Pa. 2003); *Bank of Louisiana v. Aetna U.S. Healthcare, Inc.*, 2003 U.S. Dist. LEXIS 12001, *8 (E.D. La.), there is a compelling reason for this Court to hear this case to clarify the extent to which the McCarran-Ferguson factors should be employed to determine whether a state law comes within the saving clause.

A. Colorado's Bad Faith Law Is "Specifically Directed Toward Entities Engaged in Insurance"

Colorado's bad faith law meets the first *Miller* prong requiring that it "be specifically directed toward entities engaged in insurance."

Colorado first recognized the tort of bad faith in 1970, in *Aetna Casualty & Surety Co. v. Kornbluth*, 471 P.2d 609 (Colo. App.), in allowing an insured to sue his insurer for not settling a claim within policy limits where this failure to so settle resulted in an excess judgment against the insured.

In 1984, the tort of bad faith was extended in *Farmers Group, Inc. v. Trimble*, 691 P.2d 1138, 1141 (Colo.), so that an insurer could be liable for the manner in which it handles a claim against its insured, with the court saying:

> By obtaining insurance, an insured seeks to obtain some measure of financial security and protection against calamity, rather than to secure commercial advantage. [Citations omitted] The refusal of the insurer to pay valid claims without justification, however, defeats the expectations of the insured and the purpose of the insurance contract. It is, therefore, necessary to impose a legal duty upon the insurer to deal with its insured in good faith. [Citations omitted]

In *Travelers Insurance Co. v. Savio*, 706 P.2d 1258 (Colo. 1985), bad faith was broadened to cover an insured bringing a first-party action against an insurer for its denial of benefits. The court recognized that the insured had an interest in the insurer dealing fairly and in good faith in order to be protected from economic calamity due to injury, *id.* at 1273-1274, and so that the insured would not be coerced into accepting an unfair settlement due to economic pressures. *Id.* at 1273.

In 1987, Colorado's legislature enacted C.R.S. 10-3-1113, mandating that a jury in a bad faith case be instructed as follows:

> (1) In any civil action for damages founded upon contract, or tort, or both against an **insurance company**, the trier of fact may be instructed that the **insurer** owes its **insured** the duty of good faith and fair dealing, which duty is breached if the **insurer** delays or denies payment without a reasonable basis for its delay or denial.

> (2) Under a policy of liability **insurance**, the determination of whether the **insurer's** delay or denial was reasonable shall be based on whether the **insurer's** delay or denial was negligent.
>
> (3) Under a policy of first-party **insurance**, the determination of whether the **insurer's** delay or denial was reasonable shall be based on whether the **insurer** knew that its delay or denial was unreasonable or whether the **insurer** recklessly disregarded the fact that its delay or denial was unreasonable.
>
> (4) In determining whether an **insurer's** delay or denial was reasonable, the jury may be instructed that willful conduct of the kind set forth in section 10-3-1104(1)(h)(I) to (1)(h)(XIV) is prohibited and may be considered if the delay or denial and the claimed injury, damage, or loss was caused by or contributed to by such prohibited conduct.

(Emphasis added). Thus, this statute indicates that the tort of bad faith in Colorado applies only to an insurer's treatment of its insured.

This statute's subsection (4) says that an insurer's willful conduct as set forth in C.R.S. 10-3-1104(1)(h)(I)-(XIV) is evidence of bad faith and, in looking at these subsections, they clearly focus only on insurance. Section (1) begins in saying: "The following are defined as unfair methods of competition and unfair or deceptive acts or practices in the **business of insurance**: . . . ." (Emphasis added). The subsections then indicate that this includes "Unfair claims settlement practices," such as an insurer: misrepresenting facts or policy provisions; failing to respond promptly to communications concerning insurance claims; failing to have reasonable standards for

claims investigation and failing to pay claims without conducting a reasonable investigation; failing to say within a reasonable time whether there is coverage; not attempting to settle in good faith when liability is reasonably clear; compelling insureds to litigate claims by offering substantially less than what is ultimately recovered; attempting to settle for less than what a reasonable person would feel entitled to; attempting to settle claims based upon an altered application; not telling insureds under what coverage a claim is being paid; making known a policy of appealing arbitration awards unless the insured will settle for less than the award; requiring insureds to submit multiple claim forms containing the same information; not settling under one portion of a policy to influence settlement under another portion; and failing to explain the basis for a claim denial or compromise offer.

As the court stated in *Dale v. Guaranty National Insurance Company*, 948 P.2d 545, 552 (Colo. 1997), an insurer's duty to act in good faith "permeates all of the dealings between the parties." This is because of the special relationship between insured and insurer, and the insured's dependence upon the insurer to provide the security bargained for at a time the insured is most in need. *Vaughan v. McMinn*, 945 P.2d 404, 406 (Colo. 1997).

Yet, because the parties to non-insurance contracts do not have the same relationship as exists between insured and insurer, Colorado's courts have refused to extend the bad faith tort beyond the insurance context. *Centennial Square, Ltd. v. Resolution Trust Co.*, 815 P.2d 1002 (Colo. App. 1991) (no cause of action in bad faith for breach of non-insurance contract); *Decker v. Browning-Ferris Industries of Colorado, Inc.*, 931 P.2d 436 (Colo. 1997) (no bad faith cause of action in employment arena). Thus, while it

is true that the duty to act in good faith is implied as a term in every contract in Colorado, *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995), a bad faith cause of action exists only for an insurer's bad faith breach of an insurance contract, such that Colorado's law is "specifically directed toward entities engaged in insurance."

B. Colorado's Bad Faith Law "Substantially Affect[s] the Risk Pooling Arrangement"

Under *Miller*, Colorado's bad faith law must also "substantially affect the risk pooling arrangement between the insurer and the insured." The Court noted that this "requires only that the state law substantially *affect* the risk pooling arrangement between the insurer and insured; it does not require that the state law actually spread risk." *Miller*, 123 S. Ct. 1477 n.3 (emphasis in original). So while the Court recognized that the Ninth Circuit had held that California's notice-prejudice rule did not spread risk, the Court observed that the rule

> governs whether or not an insurance company must cover claims submitted late, which dictates to the insurance company the conditions under which it must pay for the risk that it has assumed. This certainly qualifies as a substantial effect on the risk pooling arrangement between the insurer and insured.

Id.

By telling insurers, for example, that they must attempt to settle when liability becomes reasonably clear and they cannot offer less than what a reasonable person would feel entitled to, Colorado's bad faith law is "dictat[ing] to the insurance company the conditions under

which it must pay for the risk it has assumed." Therefore, Colorado's bad faith law has the same impact as the notice-prejudice rule, and so meets the second prong of the *Miller* test.

C. The Tenth Circuit Failed to Follow *Miller*

Despite the clear pronouncement of this Court in *Miller* that it was making a "clean break from the McCarran-Ferguson factors," the Tenth Circuit's panel majority applied those factors anyway in determining that Colorado's bad faith law did not come within ERISA's saving clause. As the dissent recognized, had Colorado's law been correctly reviewed under the new *Miller* criteria, it would have been protected from express preemption by the saving clause. App. 20-35.

The persistence of the panel majority in applying the McCarran-Ferguson factors can be seen in the way Colorado's law was evaluated to determine whether it was "specifically directed towards entities engaged in insurance." In this regard, the majority based the outcome on whether the law was limited to entities engaged in insurance, *i.e.*, the third McCarran-Ferguson factor. App. 8. Not only was this error considering the Court's "clean break" decree, but it ignored the *Miller* Court's express holding that Kentucky's "Any Willing Provider" statute came within the saving clause although its effect was not limited to insurers. *Id.*, 123 S. Ct. at 1475-76, 1476 n.1.

The majority also cited *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), in holding that Colorado's law was not saved because its roots were firmly planted in general principles of Colorado's tort and contract law. App. 8-9. Yet, *Miller* said nothing about a law coming within the saving

clause being conditioned upon how that law had developed. Thus, the majority impermissibly added a third requirement to the *Miller* test. Even so, as shown above, Colorado's law is limited to entities engaged in insurance and does not have roots firmly planted in general principles of Colorado's tort and contract law. The majority misconstrued Colorado case law in ruling that Colorado recognizes a bad faith cause of action outside the insurance context. So, it has been said: "Colorado has also recognized a separate cause of action sounding in tort for bad faith breach of *insurance* contract. However, no such tort claim has been recognized in other contract actions. . . . " *Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.*, 872 P.2d 1359, 1362 (Colo. App. 1994) (emphasis in original) (breach of implied duty of good faith and fair dealing by "acts of deception, concealment, and chicanery" gives rise to "*merely a breach of contract [action] with standard remedies,*" but not bad faith claim for relief).

In fact, far from being an actual cause of action, the duty to act in good faith and to deal fairly is no more than a rule of construction to determine if there has been a breach where a contract gives one party discretion in the performance of a term. *See Id.* at 1363; *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995) (failure to exercise discretion in good faith in setting rent amounts to breach of contract entitling party to contract damages only, *i.e.*, the amount of overpayment); *Rogers v. Westerman Farm Co.*, 29 P.3d 887, 908-910 (Colo. 2001) (where contract gives seller discretion to set price, price determined based on "what a fair sale price would have been had the lessee acted in good faith").

The panel majority also applied obsolete precedent, making use of McCarran-Ferguson factors one and two, in holding that Colorado's law did not "substantially affect the risk pooling arrangement" because it did not spread risk and that it was not integral to the policy relationship since it did not affect the contract's substantive terms. App. 9-11. In so holding, the majority inexplicably disregarded *Miller's* ruling that this prong did not equate with spreading of risk, 123 S.Ct. at 1477 n.3, and ignored this Court's rejection of the idea that the law must affect a substantive term of the policy. So, this Court stated: "We have never held that state laws must alter or control the actual terms of insurance policies to be deemed 'laws . . . which regulate insurance' under § 1144(b)(2)(A); it suffices that they substantially affect the risk pooling arrangement between insurer and insured." *Id.* at 1477.

Therefore, in applying the discarded McCarran-Ferguson factors, the panel majority not only disregarded *Miller's* "clean break" edict, but as appreciated by the dissent, "help[ed] dismantle the protective system devised by Colorado's legislature and courts for Colorado's citizens." App. 35.

CONCLUSION

Since 1987 insurers have been immune from bad faith liability through application of ERISA's preemption clause. This has allowed insurers to mock justice by trampling upon the rights of disabled employees in pursuit of unearned profits. This Court, through review of the instant case upon the granting of this petition, can restore justice to its rightful place so that millions of employees will

finally receive the protection Congress intended in enacting ERISA.

Respectfully submitted,

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APPENDIX A

Jon F. KIDNEIGH, Plaintiff/Cross-Appellee,

and

Barbara Kidneigh, Plaintiff-Appellant/Cross-Appellee,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA, a Maine Corporation, Defendant-Appellee/Cross-Appellant.

Colorado Trial Lawyers Association, Amicus Curiae.

Nos. 02-1277, 02-1282.

United States Court of Appeals,
Tenth Circuit.

Filed Oct. 3, 2003.

Stephen C. Kaufman, Denver, CO, for Plaintiffs-Appellants/Cross-Appellees.

Michael S. Beaver, Holland & Hart, L.L.P., Greenwood Village, CO, (Marcy G. Glenn and Jack M. Englert, Jr., Holland & Hart, L.L.P., Denver, CO, with him on the briefs), for Defendant-Appellee/Cross-Appellant.

Michael J. Rosenberg and Bradley A. Levin, Roberts, Levin & Patterson, P.C., Denver, CO, for Amicus Curiae Colorado Trial Lawyers Association.

Before KELLY, HENRY, and HARTZ, Circuit Judges.

KELLY, Circuit Judge.

Plaintiff/Cross-Appellee Jon Kidneigh and Plaintiff-Appellant/Cross-Appellee Barbara Kidneigh brought suit

seeking disability benefits pursuant to 29 U.S.C. §§ 1132(a)(1)(B) and (g), the Employment Retirement Income Security Act of 1974 ("ERISA"), along with state law claims for bad faith and loss of consortium. We have jurisdiction under 28 U.S.C. § 1292(b), and we affirm in part and reverse in part.

Background

Plaintiff Jon Kidneigh brought a claim against UNUM Life Insurance Co. ("UNUM") seeking disability benefits pursuant to §§ 1132(a)(1)(B) and (g) of the Employment Retirement Income Security Act of 1974 ("ERISA"). UNUM is the claims administrator of a long-term disability plan covering employees of the law firm of Kidneigh & Kaufman, P.C. Though UNUM paid disability benefits to Mr. Kidneigh after a series of back and hernia surgeries, UNUM stopped paying benefits on March 31, 1999, after determining that Mr. Kidneigh was physically capable of performing his job as an attorney.

Mr. Kidneigh also brought a state law claim for bad faith along with the direct ERISA claim seeking continued benefits, and his wife brought a state law claim for loss of consortium. UNUM moved to dismiss Mr. Kidneigh's bad faith claim and Mrs. Kidneigh's loss of consortium claim on the grounds that both are preempted by ERISA. The district court denied the motion with respect to Mr. Kidneigh but granted the motion with respect to Mrs. Kidneigh. The district court granted an unopposed motion for interlocutory appeal brought pursuant to Fed.R.Civ.P. 52(b), finding that the issue "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Both Mrs.

Kidneigh and UNUM appeal from the district court's order; Mrs. Kidneigh appeals from the dismissal of her loss of consortium claim, and UNUM appeals from the denial of the motion to dismiss Mr. Kidneigh's bad faith claim.

Discussion

Because the scope of ERISA preemption is a question of law, the district court's decision is subject to de novo review. *Conover v. Aetna U.S. Health Care, Inc.*, 320 F.3d 1076, 1077 (10th Cir.2003).

"[A]ny court forced to enter the ERISA preemption thicket sets out on a treacherous path." *Gonzales v. Prudential Ins. Co.*, 901 F.2d 446, 451-52 (5th Cir.1990). In this case we must resolve whether a Colorado state law bad faith claim against an employment disability insurance provider is preempted by ERISA. A secondary issue is whether a spouse's derivative loss of consortium claim is also preempted by ERISA.

The issue here is one that frequently confronts the federal courts due to ERISA's "statutory complexity." *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 740, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985). ERISA's preemption clause broadly states that "[e]xcept as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). What Congress took away with one hand, however, it gave back with the other as contained in ERISA's saving clause: "Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any

person from any law of any State which regulates insurance, banking, or securities." *Id.* § 1144(b)(2)(A). Subparagraph (B) (the deemer clause), in turn, provides:

> Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

Id. § 1144(b)(2)(B). As summarized by the Supreme Court:

> If a state law "relate[s] to . . . employee benefit plan[s]," it is pre-empted. The saving clause excepts from the pre-emption clause laws that "regulat[e] insurance." The deemer clause makes clear that a state law that "purport[s] to regulate insurance" cannot deem an employee benefit plan to be an insurance company.

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) (citations omitted). The Supreme Court has further noted that "[t]he pre-emption clause is conspicuous for its breadth," *FMC Corp. v. Holliday,* 498 U.S. 52, 58, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990), and that "the express pre-emption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'" *Pilot Life,* 481 U.S. at 45-46, 107 S.Ct. 1549.

In addition to Congress's power to "define explicitly the extent to which its enactments pre-empt state law," a state law can also be preempted "to the extent that it actually conflicts with federal law." *English v. Gen. Elec.*

Co., 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). Where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," then the state law is preempted. *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941). State law causes of action, then, are preempted under ERISA both when they are expressly preempted by the terms of the statute as well as when the state law provides remedies beyond those contained in ERISA itself. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143-44, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990); *Pilot Life*, 481 U.S. at 54, 107 S.Ct. 1549 ("The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive."). The Supreme Court has noted that a distinction can be drawn between cases involving an "additional claim or remedy," such as *Pilot Life*, and cases "bear[ing] a resemblance to the claims-procedure rule" sustained in *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 368, 119 S.Ct. 1380, 143 L.Ed.2d 462 (1999). *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 380, 122 S.Ct. 2151, 153 L.Ed.2d 375 (2002). Cases on the former side of the distinction fall within "*Pilot Life's* categorical preemption." *Id.*

We hold that Colorado bad faith claims are preempted by ERISA because they conflict with ERISA's remedial scheme. State law bad faith claims such as the Colorado claim in this case – insofar as they provide an "additional claim" to plaintiffs – clearly fall on the former side of the distinction drawn in *Rush Prudential* and "fit within the

category of state laws *Pilot Life* had held to be incompatible with ERISA's enforcement scheme" by "provid[ing] a form of ultimate relief in a judicial forum that add[s] to the judicial remedies provided by ERISA." *Id.* at 379, 122 S.Ct. 2151.

As this court explained recently, "Nowhere does [ERISA] allow consequential or punitive damages. Damages are limited to the recovery of 'benefits due . . . under the terms of the plan.'" *Conover,* 320 F.3d at 1080 (alteration in original). The Oklahoma bad faith claim in *Conover,* like the Colorado bad faith claim here, "allows plan participants to obtain 'consequential and, in a proper case, punitive, damages' for breach of good faith and fair dealing by an insurer." *Id.* Where such damages are available, they "provide[ ] a cause of action excluded from [ERISA's] civil enforcement scheme and would therefore 'pose an obstacle to the purposes and objectives of Congress.'" *Id.* (quoting *Gaylor v. John Hancock Mut. Life Ins. Co.,* 112 F.3d 460, 466 (10th Cir.1997)); *see also Moffett v. Halliburton Energy Servs., Inc.,* 291 F.3d 1227, 1237 (10th Cir.2002).

The Supreme Court has strongly indicated in dicta that a state law falling within ERISA's savings clause ("nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance," 29 U.S.C. § 1144(b)(2)(A)) would still be preempted merely by providing remedies beyond those prescribed in ERISA. *See Rush Prudential,* 536 U.S. at 377, 122 S.Ct. 2151 (2002) ("Although we have yet to encounter a forced choice between the congressional policies of exclusively federal remedies and the 'reservation of the business of insurance to the States,' we have anticipated such a conflict, with the state insurance

regulation losing out if it allows plan participants 'to obtain remedies . . . that Congress rejected in ERISA.'") (citations omitted). In addition to being preempted due to conflict with ERISA's remedial scheme, we are persuaded that – in the alternative – the Colorado bad faith claim in this case does not fall within ERISA's savings clause, and as such is expressly preempted.

It is undisputed that the Kidneighs' claims "relate" to an employee benefit plan, and so our inquiry on this aspect of preemption moves to the second phase of determining whether Colorado bad faith law "regulates insurance." In light of the case law in this area, our conclusion is that it does not. The Supreme Court's recent decision in *Kentucky Ass'n of Health Plans, Inc. v. Miller,* ___ U.S. ___, 123 S.Ct. 1471, 155 L.Ed.2d 468 (2003) (holding Kentucky's "Any Willing Provider" statute not preempted by ERISA), substantially clarified the test for determining when a state law is not preempted by ERISA because it "regulates insurance" under § 1144(b)(2)(A): "First, the state law must be specifically directed toward entities engaged in insurance," and "[s]econd . . . the state law must substantially affect the risk pooling arrangement between the insurer and the insured." ___ U.S. at ___, 123 S.Ct. at 1479.

Tested against these two factors, we hold, as noted above, that a Colorado state law bad faith cause of action against an ERISA provider is expressly preempted. In order to be characterized as a state law "regulating insurance," the law must not "just have an impact on the insurance industry" but must be "specifically directed toward that industry." *Pilot Life,* 481 U.S. at 50, 107 S.Ct. 1549. Stated otherwise, the state law must "home[ ] in on

the insurance industry." *Ward,* 526 U.S. at 368, 119 S.Ct. 1380.

The Colorado courts do appear to have largely (but, importantly, not exclusively) confined bad faith causes of action to the insurance setting. *See Dale v. Guar. Nat'l Ins. Co.,* 948 P.2d 545, 552 (Colo.1997); *Vaughan v. McMinn,* 945 P.2d 404, 406 (Colo.1997). *But see Rogers v. Westerman Farm Co.,* 29 P.3d 887, 908 (Colo.2001) (bad faith claim applied to oil and gas leases); *Amoco Oil Co. v. Ervin,* 908 P.2d 493, 498 (Colo.1995) ("Colorado, like the majority of jurisdictions, recognizes that *every contract* contains an implied duty of good faith and fair dealing. . . . The good faith performance doctrine is generally used to effectuate the intentions of the parties or to honor their reasonable expectations.") (emphasis added). Even if the Colorado state courts had limited bad faith claims to the insurance context, however, that fact alone would not save Colorado bad faith claims from ERISA preemption. The Supreme Court's *Pilot Life* decision, in which Mississippi's bad faith cause of action was held to be preempted by ERISA, dealt with a state bad faith law apparently confined by a state supreme court to insurance contracts. "Even though the Mississippi Supreme Court has identified its law of bad faith with the insurance industry, the roots of this law are firmly planted in the general principles of Mississippi tort and contract law," and so the Court held that the Mississippi law did not "regulate insurance." 481 U.S. at 50, 107 S.Ct. 1549; *see also Gaylor v. John Hancock Mut. Life Ins. Co.,* 112 F.3d 460, 466 (10th Cir.1997) ("[A]lthough Oklahoma's bad faith law is specifically directed at the insurance industry, we note that, like the bad faith law in *Pilot Life,* its origins are from general principles of tort and contract law."); *Halprin v. Equitable Life Assurance Soc.,*

267 F.Supp.2d 1030, 1038 (D.Colo.2003)[1] (following *Kelley v. Sears, Roebuck & Co.*, 882 F.2d 453 (10th Cir.1989), and holding Colorado's bad faith law preempted; subsequent Colorado case law developments merely described, but did not change, the development of bad faith).

As to the second factor in ERISA express preemption analysis, *Pilot Life* and other ERISA preemption cases show that state bad faith claims do not "substantially affect the risk pooling arrangement" between insurers and their insureds, which is the hallmark of insurance contracts. *See SEC v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 73, 79 S.Ct. 618, 3 L.Ed.2d 640 (1959). State law bad faith claims are not integral to the risk pooling arrangement for the reasons summarized in *Pilot Life:*

> In contrast to the mandated-benefits law in *Metropolitan Life,* the common law of bad faith does not define the terms of the relationship between the insurer and the insured; it declares only that, whatever terms have been agreed upon in the insurance contract, a breach of that contract may in certain circumstances allow the policyholder to obtain punitive damages. The state common law of bad faith is therefore no more "integral" to the insurer-insured relationship than any State's general contract law is integral to a contract made in that State.

481 U.S. at 51, 107 S.Ct. 1549.

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[1] Thus, we reject *Colligan v. UNUM Life Ins. Co. of Am.*, 2001 WL 533742 (D.Colo. April 23, 2001), which held that Colorado's bad faith law was not preempted without citation or discussion of *Kelley.*

Any-willing provider statutes, notice-prejudice rules, and independent review provisions all "substantially affect[ ] the type of risk pooling arrangements that insurers may offer." *Miller,* 123 S.Ct. 1471, 1477-78. By contrast, bad faith claims, whether common law or statutory, merely provide an additional remedy for policyholders. *See Gaylor,* 112 F.3d at 466 ("[Oklahoma bad faith law] does not effect a change in the risk borne by insurers and the insured, because it does not affect the substantive terms of the insurance contract. On the other hand, a law mandating that a certain disease be covered under health insurance contracts would effect a spread of risk, both from insureds to insurers, and among the insureds themselves."); *Nguyen v. Healthguard of Lancaster, Inc.,* ___ F.Supp.2d ___, 2003 WL 22100157, at *8 (E.D.Pa. Aug.14, 2003) (Pennsylvania bad faith statute by providing an additional remedy for insureds if contract is breached, "bears no relation to the risk insured against, . . . even though [it] may raise the premiums insureds must pay for their coverage."). As the Colorado federal district court in *Denette v. Life of Ind. Ins. Co.,* 693 F.Supp. 959 (D.Colo.1988), noted with regard to Colorado's bad faith law, "[T]here is no indication that the statutes . . . have any effect of transferring or spreading policy holder risk. . . . [T]hese statutes do not purport to regulate the substantive terms or content of insurance policies by mandating certain benefits.". *Id.* at 966.

An examination of Tenth Circuit case law on the preemption of state law bad faith claims under ERISA underscores our conclusion that bad faith claims will rarely, if ever, be saved from preemption. In *Kelley v. Sears, Roebuck & Co.,* 882 F.2d 453 (10th Cir.1989), this court held that ERISA preempted a Colorado bad faith

claim, finding that Colorado's law is "'very similar in substance' to the Mississippi law at issue in *Pilot Life.*" *Id.* at 456 (quoting *Denette,* 693 F.Supp. at 966). Tracking the language of *Pilot Life,* the court held in *Kelley* that (1) "Colorado's common law of bad faith does not regulate insurance," insofar as (2) "[i]t neither spreads policyholder risk nor controls the substantive terms of the insurance contract," (3) "[a]lthough associated with the insurance industry, [Colorado bad faith law] developed from the general principles of tort and contract law," and (4) "Colorado's common law of bad faith conflicts with ERISA's civil enforcement remedies." *Id.*

The Kidneighs fail to overcome *Kelley's* precedential value in this case. According to the Kidneighs, the Supreme Court's decisions in *Ward* and *Miller* worked a wholesale reconsideration of ERISA preemption analysis, and pre-*Ward* Tenth Circuit case law (and, by implication, pre-*Ward* Supreme Court cases such as *Pilot Life*) is not controlling here. This argument, however, is hard to square with the continued citation to *Pilot Life* in recent Supreme Court cases and citations to *Kelley* in recent Tenth Circuit cases. *See Moffett,* 291 F.3d at 1236-37 (10th Cir.2002) ("[W]e conclude that Wyoming's law does not regulate insurance such that it falls within ERISA's saving clause. Wyoming's bad faith law does not have the effect of transferring or spreading policyholder risk.") (citing *Kelley,* 882 F.2d at 456). Recent Supreme Court and Tenth Circuit cases indicate that, while the precise formulation of the test for analyzing ERISA preemption cases has evolved, the holdings of prior cases are still valid as to the preemption of bad faith claims.

The Kidneighs similarly overstate the effect of *Miller* on this case when they claim in their Supplemental Brief

that "[p]rior case law from the Supreme Court and this Circuit holding that state bad faith laws are preempted based upon a McCarran-Ferguson analysis are now without precedential value" and that "[t]he Supreme Court has thus eviscerated the precedential value of *Pilot Life*." Aplt. Supp. Br. at 1-2. On the contrary, the Court in *Miller* notes that the now-discarded McCarran-Ferguson factors used in *Pilot Life* were, in the earlier opinion, "mere 'considerations [to be] weighed' in determining whether a state law falls under the savings clause," ___ U.S. at ___, 123 S.Ct. at 1479 (quoting *Pilot Life,* 481 U.S. at 49, 107 S.Ct. 1549), and that in none of the Court's ERISA pre-emption decisions were "the McCarran-Ferguson factors an essential component of the [preemption] analysis," *id.* (discussing *Metro. Life,* 471 U.S. at 742-43, 105 S.Ct. 2380, and *Ward,* 526 U.S. at 374, 119 S.Ct. 1380). Had the Supreme Court intended *Miller* to overrule *Pilot Life* or, in the Kidneighs' words, eviscerate its precedential value, the Court could have said as much; the fact that *Pilot Life* is still cited in *Miller* with approval suggests otherwise. *See also Leuthner v. Blue Cross and Blue Shield,* 270 F.Supp.2d 584, 592-94 (M.D.Pa.2003) (applying *Miller* and relying upon reasons in *Pilot Life* to conclude that Pennsylvania bad faith statute did not affect risk pooling arrangement); *McGuigan v. Reliance Standard Life Ins. Co.,* 256 F.Supp.2d 345, 348 (E.D.Pa.2003) (same).

Nor is the Kidneighs' argument availing that Colorado law governing bad faith claims has evolved to the point where a case from 1989 (*Kelley*) is no longer applicable in 2003. The statute on insurance unfair competition and deceptive practices in Colorado cited by the Kidneighs – enacted before *Kelley* – merely provides remedies for and prevents unfairness in the insurance industry and states

that juries in civil cases against insurance companies may be instructed that "the insurer owes its insured the duty of good faith and fair dealing." Colo.Rev.Stat. Ann. § 10-3-1113(1) (West 2003). Colorado is hardly the only state to attempt to so distinguish generic contract bad faith and insurance bad faith; several states have similar insurance bad faith statutory provisions, and they are routinely held to be expressly preempted by ERISA. *See, e.g., Gilbert v. Alta Health & Life Ins. Co.,* 276 F.3d 1292, 1297-99 (11th Cir.2001) (Alabama insurance bad faith statute preempted by ERISA); *Gaylor,* 112 F.3d at 466 (Oklahoma insurance bad faith statute preempted by ERISA); *Swerhun v. Guardian Life Ins. Co. of Am.,* 979 F.2d 195, 199 (11th Cir.1992) (Florida insurance bad faith statute preempted by ERISA).

As to Mrs. Kidneigh's loss of consortium claim, the Kidneighs concede that preemption of Mr. Kidneigh's bad faith claim would entail preemption of Mrs. Kidneigh's loss of consortium claim:

> [A]s a derivative claim, a claim for loss of consortium is only as valid as the claim from which it derives. In essence it is no more than an element of damages that comes with the principal claim. . . .
>
> [A] loss of consortium claim is not preempted if the claim it derives from is not preempted, but it is preempted if ERISA preempts the principal claim.

Aplt. Br. at 11-12 (citing *Pacificare of Okla., Inc. v. Burrage,* 59 F.3d 151 (10th Cir.1995)). This result is true whether the loss of consortium claim is understood to derive from the bad faith claim (as the Kidneighs contend) or from the ERISA claim (as UNUM contends). If the

former, then the Kidneighs' concession above controls. If the loss of consortium claim is derived from the ERISA claim, then the loss of consortium claim is best characterized as a state law claim preempted by ERISA. *See Bast v. Prudential Ins. Co. of Am.*, 150 F.3d 1003, 1009-10 (9th Cir.1998); *Burrage*, 59 F.3d at 155 ("A loss of consortium claim against an [insurer] alleging negligent or fraudulent administration of the plan is preempted by ERISA."). The plain language of ERISA and prevailing Supreme Court and Tenth Circuit authority lead, then, to the conclusion that Mr. Kidneigh's Colorado state law bad faith claim is preempted by ERISA and that his wife's loss of consortium is similarly preempted.

We are unpersuaded that *Elliot v. Fortis Benefits Ins. Co.*, 337 F.3d 1138 (9th Cir.2003), suggests a different result. That case held that a state-law unfair trade practices act claim was preempted under ERISA's civil enforcement provision, 29 U.S.C. § 1132, relying upon *Pilot Life*. *Elliot*, 337 F.3d at 1147. The court found that the state act "provides damages above and beyond those provided in ERISA, including punitive damages," and was therefore preempted by § 1132. *Id.* Though the opinion contains an interesting discussion concerning the evolution of § 1144 preemption, the court did not reach whether (1) the state act was specifically directed toward entities engaged in insurance and (2) whether it substantially affects the risk pooling arrangement between the insurer and the insured. *Elliot*, 337 F.3d at 1146. Notwithstanding the dissent and its reliance on *Elliot*, we remain persuaded that neither factor is present here.

The district court's decision is AFFIRMED in part (as to Mrs. Kidneigh's loss of consortium claim) and REVERSED in part (as to Mr. Kidneigh's bad faith claim).

HENRY, J., concurring in part and dissenting in part.

I concur in the majority's holding that Mr. Kidneigh's Colorado bad faith claim is foreclosed by ERISA conflict preemption. *See* Maj. Op. at 1184-1186. Because I agree that "preemption of Mr. Kidneigh's bad faith claim . . . entail[s] preemption of Mrs. Kidneigh's loss of consortium claim," *id.* at 1189, I therefore also concur in the ultimate holding that the Kidneighs' claims are "preempted by ERISA." *Id.* at 1189. My agreement with the majority, however, ends there.

Two aspects of the majority's reasoning concern me. First, the majority's ERISA direct preemption analysis, *see id.* at 1186-1189, is unnecessary to our ultimate holding. Second, the majority's conclusion following that analysis, that Mr. Kidneigh's Colorado insurance bad faith claim is foreclosed by ERISA direct preemption, is problematic.

A. The Majority's Direct Preemption Analysis is Unnecessary

Justice Breyer has warned of the need in certain situations for "judicial caution and humility."[1] This is one of those situations: we should be very careful in invalidating state legislatures' actions under federal law. To decide this case, we did not need to go any further than the majority's concise and correct application of the ERISA conflict preemption rules from *Rush Prudential HMO, Inc. v. Moran,* 536 U.S. 355, 375, 122 S.Ct. 2151, 153 L.Ed.2d

[1] Stephen Breyer, *Our Democratic Constitution,* 77 N.Y.U. L.Rev. 245, 261 (2002).

375 (2002), and *Conover v. Aetna U.S. Health Care, Inc.*, 320 F.3d 1076 (10th Cir.2003), to the remedies sought by the plaintiffs. *See* Maj. Op. at 1184-1186.

"This court considers itself *bound* by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements." *Gaylor v. United States,* 74 F.3d 214, 217 (10th Cir.1996) (emphasis supplied). As the majority explains, *see* Maj. Op. at 1184-1186, a state law regulating insurance is foreclosed by ERISA conflict preemption if it allows plan participants to obtain remedies not available under ERISA. And as the majority concedes, *see id.* at 1186, the Supreme Court has made clear that if a state law claim is foreclosed by ERISA conflict preemption, that claim is foreclosed *regardless* of whether the law on which the claim is based is, or is not, foreclosed by the doctrine of direct preemption. *See Rush,* 536 U.S. at 377, 122 S.Ct. 2151 ("Although we have yet to encounter a forced choice between the congressional policies of exclusively federal remedies and the reservation of the business of insurance to the States, *we have anticipated such a conflict, with the state insurance regulation losing out if it allows plan participants to obtain remedies that Congress rejected in ERISA*") (internal citations and quotation marks omitted) (emphasis supplied); *Boggs v. Boggs,* 520 U.S. 833, 841, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997) ("*We can begin, and in this case end,* the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects. We hold that there is a conflict, which *suffices* to resolve the case. We need not inquire whether the statutory phrase 'relate to' provides further and additional support for the pre-emption claim.") (emphasis supplied); *cf. Ingersoll-Rand Co. v. McClendon,* 498 U.S.

133, 142, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990) ("*Even if* there were no express pre-emption in this case, the Texas cause of action would be pre-empted because it conflicts directly with an ERISA cause of action.") (emphasis supplied).

Indeed, on several occasions, the Supreme Court has addressed conflict preemption as a basis independent of direct preemption for holding that ERISA superseded the common law tort claim in a given case. *See Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 51-57, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987); *Ingersoll-Rand,* 498 U.S. at 142-45, 111 S.Ct. 478. Significantly, in its recent ERISA preemption cases the Court has assumed that ERISA conflict preemption could foreclose a state claim even if the state law in question fell within ERISA's insurance savings clause. *See, e.g., Rush,* 536 U.S. at 374-87, 122 S.Ct. 2151 (performing ERISA conflict preemption after rejecting an ERISA direct preemption claim); *UNUM Life Ins. Co. of Am. v. Ward,* 526 U.S. 358, 375-77, 119 S.Ct. 1380, 143 L.Ed.2d 462 (1999) (same).

The necessary logical predicate of these cases is that ERISA direct preemption and ERISA conflict preemption operate *independently* from each other. Put another way, a state statute is preempted, and a claim based on that statute foreclosed, when the party asserting ERISA preemption satisfies the applicable standard for *either* of the two main flavors of ERISA preemption, direct or conflict. When one of those two types of ERISA preemption is demonstrated, it is wholly unnecessary for a court to engage in analysis of whether the other ERISA preemption doctrine applies. The majority does not attempt to dispute this principle.

Nonetheless, the majority, having correctly determined that the claims are barred by ERISA conflict preemption, ventures unnecessarily and at length further down that "treacherous path," as it accurately terms ERISA preemption analysis, Op. at 1184, by engaging in ERISA direct preemption analysis. The majority makes an ERISA direct preemption holding "in the alternative," Maj. Op. at 1186, reaching to interpret as a matter of first impression the test recently announced in *Kentucky Ass'n of Health Plans, Inc. v. Miller*, ___ U.S. ___, 123 S.Ct. 1471, 155 L.Ed.2d 468 (2003). Although such certainty and courage may in some contexts warrant admiration, I am concerned that the majority misapplies *Miller*. I therefore address also the majority's ERISA direct preemption analysis.

B. Colorado's Insurance Bad Faith Law is Not Foreclosed by ERISA Direct Preemption

1. ERISA's Direct Preemption and Insurance Savings Clauses

ERISA "comprehensively regulates employee pension and welfare plans." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985). Benefit providers may either self-insure or purchase insurance for their beneficiaries. *See id.* Plans such as the Kidneighs' that purchase insurance "are directly affected by state laws that regulate the insurance industry." *Id.* The question in such cases becomes whether the state law at issue is preempted by ERISA. ERISA contains an express, or direct, preemption provision, which states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any

employee benefit plan." 29 U.S.C. § 1144(a); *see also Conover,* 320 F.3d at 1079.

In a legislative act that the Supreme Court has described politely as "perhaps . . . not a model of legislative drafting," *Metropolitan Life,* 471 U.S. at 739, 105 S.Ct. 2380, Congress, despite the breadth of ERISA's direct preemption clause, followed that clause with an insurance savings clause, which "saves from preemption state laws 'regulat[ing] insurance.'" *Conover,* 320 F.3d at 1078 (quoting 29 U.S.C. § 1144(b)(2)(A)). The insurance savings clause "reclaims a substantial amount of ground with its provision that 'nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance.'" *Rush,* 536 U.S. at 364, 122 S.Ct. 2151 (quoting 29 U.S.C. § 1144(b)(2)(A)).

Thus, "employee benefit plans that are insured are subject to indirect state insurance regulation." *FMC Corp. v. Holliday,* 498 U.S. 52, 61, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990). "An insurance company that insures a plan remains an insurer for purposes of state laws purporting to regulate insurance." *Id.* (internal quotation marks omitted). "The insurance company is therefore *not relieved* from state insurance regulation." *Id.* (emphasis supplied). The Supreme Court has noted that this distinction reflects "the presumption that Congress does not intend to preempt areas of traditional state regulation. . . . Congress provided that the 'business of insurance, and every person engaged therein, *shall be subject to the laws of the several States* which relate to the regulation or taxation of such business.'" *Id.* at 62, 111 S.Ct. 403 (quoting 15 U.S.C. § 1012(a)) (emphasis supplied).

It is undisputed that the Kidneighs' claims "relate" to an employee benefit plan. Thus, resolution in this case of whether ERISA direct preemption applies turns on whether Colorado's insurance bad faith law "escape[s] preemption under the saving clause." *Ward,* 526 U.S. at 367, 119 S.Ct. 1380 (citing 29 U.S.C. § 514(b)(2)(A)). "To determine whether [Colorado's laws] are saved from preemption, we must ascertain whether they are 'laws . . . which regulate insurance' under § 1144(b)(2)(A)." *Miller,* ___ U.S. at ___, 123 S.Ct. at 1475.

2. Applying *Miller*

The Supreme Court's most recent interpretation of § 1144's "regulate insurance" language came in *Miller,* ___ U.S. ___, 123 S.Ct. 1471, 155 L.Ed.2d 468, a unanimous decision handed down in April of this year. The majority states that *Miller* effected merely a change in the "precise formulation of the test for analyzing ERISA preemption cases." Maj. Op. at 1188. However, as recognized by the only circuit decision to interpret *Miller, Miller* announced a "*change* in the law involving § 1144." *Elliot v. Fortis Benefits Ins. Co.,* 337 F.3d 1138, 1145 (9th Cir.2003) (noting that under the new risk standard, state laws might be found to regulate insurance "under a much wider variety of statutes" than earlier Supreme Court caselaw suggested) (emphasis supplied). *See also Rosenbaum v. Unum Life Ins. Co. of Am.,* 2003 WL 22078557 (E.D.Pa. Sept.8, 2003); 2 Guide to Employment Law and Regulation § 19:39 (June 2003) (noting that "[t]he rationale utilized by the Supreme Court [in *Miller*] is contrary to its previous decisions that set forth a test for determining whether laws regulate insurance within the meaning of ERISA.").

Indeed, prior to *Miller,* courts were required to follow the test set forth in *Metropolitan Life:* (1) asking whether, from a "common-sense view of the matter," a state law "regulates insurance," and (2) testing that result against the factors interpreting the "business of insurance" antitrust exemption in the McCarran-Ferguson Act. *Metropolitan Life,* 471 U.S. at 743, 105 S.Ct. 2380; *Conover,* 220 F.3d at 1078. The Court in *Miller* explained that its "*prior* decisions construing § 1144(b)(2)(A) have relied, to varying degrees, on our cases interpreting §§ 2(a) and 2(b) of the McCarran-Ferguson Act." ___ U.S. at ___, 123 S.Ct. at 1478 (emphasis supplied). "In determining whether certain practices constitute 'the business of insurance' under the McCarran-Ferguson Act," noted the Court, "our cases have looked to three factors: first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." *Id.* (internal quotation marks omitted) (emphasis deleted).

The Court then indicated its dissatisfaction with the pre-*Miller* doctrine:

> our use of the McCarran-Ferguson case law in the ERISA context has misdirected attention, failed to provide clear guidance to lower federal courts, and, as this case demonstrates, added little to the relevant analysis. That is unsurprising, since the statutory language of § 1144(b)(2)(A) differs substantially from that of the McCarran-Ferguson Act.

Id.

The Court then made *new law* and announced a two-part test:

> Today we make a *clean break* from the McCarran-Ferguson factors and *hold* that for a state law to be deemed a "law . . . which regulates insurance" under § 1144(b)(2)(A), it must satisfy two requirements. First, the state law must be specifically directed toward entities engaged in insurance. Second, as explained above, the state law must substantially affect the risk pooling arrangement between the insurer and the insured.

Id. at 1479 (internal quotation marks and select internal citations omitted) (emphasis supplied).

Thus, under *Miller,* we analyze whether Colorado's insurance bad faith law "regulates insurance," and therefore falls within ERISA's insurance savings clause. 29 U.S.C. § 1144(b)(2)(A). In this context, we examine both Colorado's decisional and statutory law. *See Winchester v. Prudential Life Ins. Co. of Am.,* 975 F.2d 1479, 1484 n. 5 (10th Cir.1992). As the majority acknowledges, *see* Maj. Op. at 1188, we thus ask whether Colorado's insurance bad faith law is (1) "specifically directed toward entities engaged in insurance," *Miller,* ___ U.S. at ___, 123 S.Ct. at 1479; and (2) "substantially affect[s] the risk pooling arrangement between the insurer and the insured." *Id.* However, the majority's cramped interpretation of *Miller* infects its analysis on both *Miller* prongs.

a. Specifically directed towards entities engaged in the insurance industry

The majority concludes that Colorado's insurance bad faith law is not specifically directed at entities engaged in

the insurance industry, reasoning that Colorado courts have "not exclusively [ ] confined bad faith causes of action to the insurance setting." Maj. Op. at 1186. In doing so, the majority erroneously conflates two separate causes of action that happen to include the words "bad faith," but are quite distinct under well-settled Colorado law.

The first such cause of action is a bad faith claim that sounds in contract and arises from an alleged breach of the implied covenant of good faith and fair dealing that Colorado imports into every contract. *See, e.g.,* Maj. Op. at 1186 (citing *Rogers v. Westerman Farm Co.,* 29 P.3d 887, 908 (Colo.2001) (claim against oil company for breach of implied covenant of good faith and fair dealing), and *Amoco Oil Co. v. Ervin,* 908 P.2d 493, 498 (Colo.1995) (same)). The second is an insurance bad faith claim that sounds in tort and exists solely due to the unique relationship of a surety – insured such as that present in the cases cited by the majority. *See* Maj. Op. at 1186 (citing *Dale v. Guar. Nat'l Ins. Co.,* 948 P.2d 545, 552 (Colo.1997) (analyzing "the tort of bad faith breach of insurance contract"), and *Vaughan v. McMinn,* 945 P.2d 404, 406 (Colo.1997) ("A breach of the covenant of good faith and fair dealing by an insurer may give rise to tort liability. The basis for this liability is the special nature of the insurance contract relative to other types of contracts.")).

Contrary to the majority's insistence, in Colorado, "[c]laims for bad faith breach . . . of an insurance contract sound in *tort . . . . [and] exist independently of the liability imposed by an insurance contract." Pham v. State Farm Mut. Auto. Ins. Co.,* 70 P.3d 567, 571 (Colo.Ct.App.2003) (emphasis supplied) (citing *Daugherty v. Allstate Ins. Co.,* 55 P.3d 224 (Colo.Ct.App.2002), and *Flickinger v. Ninth Dist. Prod. Credit Ass'n,* 824 P.2d 19 (Colo.Ct.App.1991)).

Accordingly, Colorado courts have analyzed bad faith claims brought against insurers not in terms of general "bad faith" claims, but specifically as "*insurance* bad faith claim[s]." *Dale,* 948 P.2d at 551 (emphasis supplied); *see also Herod v. Colo. Farm Bur. Mut. Ins. Co.,* 928 P.2d 834, 835 (Colo.Ct.App.1996) (stating that in "cases in which the insured brings an action against the insurer, the insurer's denial of a valid claim will constitute bad faith if the insurer's conduct is unreasonable and it knows that the conduct is unreasonable or recklessly disregards the fact that the conduct is unreasonable"). Indeed, earlier this year, the Colorado Supreme Court reaffirmed that "[t]he basis for liability in tort for the breach of an insurer's implied duty of good faith and fair dealing is grounded upon the *special nature of the insurance contract and the relationship which exists between the insurer and the insured.*" *Cary v. United of Omaha Life Ins. Co.,* 68 P.3d 462, 467 (Colo.2003) (quoting *Travelers Ins. Co. v. Savio,* 706 P.2d 1258, 1272 (Colo.1985) (emphasis supplied)).

That there is a distinct body of insurance bad faith law pertaining to the insurance industry is no mere tautology. Insurance-specific policy considerations underlie Colorado's insurance bad faith tort cause of action. As the Colorado Supreme Court has explained, the doctrine reflects that "[t]he motivation of the insured when entering into an insurance contract differs from that of parties entering into an ordinary commercial contract." *Cary,* 68 P.3d at 467 (internal quotation marks and citation omitted). "[A]n insurer in contractual privity with an insured, has a financial incentive to use its leverage to limit claims," *id.,* the Colorado Supreme Court has noted, because "once a calamity has befallen an employee covered by workers compensation or an insured covered under a

private insurance contract, the injured party is particularly vulnerable because of the injury or loss." *Id.* (internal quotations and citation omitted) (emphasis supplied).

The concern expressed by the Colorado Supreme Court is that large-scale "[i]nsurers, backed by sufficient financial resources, are encouraged to delay payment of claims to their insureds with an eye toward settling for a lesser amount than due under the policy." *Id.* (internal quotation marks omitted). Regarding claims for disability coverage, the Colorado Supreme Court has noted that "[t]he inequity of this situation becomes particularly apparent in the area of disability insurance in which the insured [is] often pursued by creditors and devoid of bargaining power." *Id.* (internal quotation marks omitted).

The Colorado legislature has similarly carved out a distinct set of laws applicable to insurance companies' bad faith behavior. The majority's conclusion that Colorado's insurance bad faith law is not specifically directed towards entities engaged in insurance lies in contrast with the following. In 1987, the Colorado legislature amended the Chapter 65 of its civil code, the chapter addressing "The Regulation of Insurance Companies." In an Act titled, "Concerning Remedies for Persons Injured by Acts of Insurance Companies Which Constitute Unfair Settlement Practices," 1987 Colo. Leg. Sess., Vol. I at 423, the Colorado legislature enacted § 10-3-1113 to supplement the state's common law insurance bad faith tort law. *See id.* at 423-424 (codifying the enactment of Colo. Stat. §§ 10-3-1113 and 10-3-1114). *See also* Col.Rev.Stat. § 10-3-1114 ("Nothing in this part . . . shall be construed to . . . abrogate any common law contract or tort cause of action."). The statute provides a standard applicable *only to bad faith claims against insurance providers;* it mandates jury

instructions that shall apply in a bad faith claim "[i]n any civil action for damages founded upon contract, or tort, or both against an insurance company," and states that "the trier of fact may be instructed that the insurer owes its insured the duty of good faith and fair dealing, which duty is breached if the insurer delays or denies payment without a reasonable basis for its delay or denial." Col.Rev.Stat. § 10-3-1113.

Section 10-3-1113(4) states that "[i]n determining whether an insurer's delay or denial was reasonable, the jury may be instructed that willful conduct of the kind set forth in sections 10-3-1104(1)(h)(I) to (1)(h)(XIV) is prohibited and may be considered if the delay or denial and the claimed injury, damage, or loss was caused by or contributed to by such prohibited conduct." Those provisions define "as unfair methods of competition and unfair or deceptive acts or practices in the *business of insurance*" (emphasis supplied), numerous and unmistakable references to the conduct of insurance companies, including

> Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies; or
>
> Failing to adopt and implement reasonable standards for the prompt investigation of *claims arising under insurance policies;* or
>
> Refusing to pay claims without conducting a reasonable investigation based upon all available information; or
>
> Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed; or

> *Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;* or
>
> Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds; or
>
> Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

COL.REV.STAT. § 10-3-1104(1)(h)(II) (VIII) (emphasis supplied).

Both this statute's insurance-specific standard for any suit alleging a bad faith tort claim brought by an insured against a direct insurance provider such as UNUM, *and* the Colorado common law governing insurance bad faith torts under standards specific to the insurance setting, are thus distinct in a meaningful way from the contract law bad faith cause of action the majority repeatedly invokes.

Further evidence of this distinction is that the type of bad faith claim at issue here has, contrary to the majority's assertion, *see* Maj. Op. at 1186, been cabined exclusively to the insurance setting. Unlike the laws of certain jurisdictions cited by the majority, *see* Maj. Op. at 1185 and 1188, the statutory and common law rules governing insurance bad faith tort law in Colorado have *not* been extended to other situations where special circumstances create unique duties. *Compare, e.g., Moffett v. Halliburton Energy Servs., Inc.*, 291 F.3d 1227, 1236 (10th Cir.2002) (in

holding that Wyoming's bad faith law did not regulate insurance, emphasizing that "the tort of bad faith breach as developed in Wyoming is not unique to the insurance industry; rather, it is unique to those settings in which a 'special relationship' exists, including the insurance and employment contexts") *with Decker v. Browning-Ferris Indus. of Colo., Inc.*, 931 P.2d 436, 446 (Colo.1997) (noting that "the torts of wrongful discharge in violation of public policy and bad faith breach of the implied covenant of good faith and fair dealing inherent in insurance contracts are based on administrative or legislative declarations of public policy," and concluding that "*there is no appropriate basis upon which to ground a tort of breach of an express covenant of good faith and fair dealing in employment contracts*") (emphasis supplied). Unlike the claim under Mississippi law for "tortious breach of contract" held to be preempted by ERISA in *Pilot Life,* 481 U.S. at 48, 107 S.Ct. 1549, insurance bad faith tort law in Colorado, in both common law and statute form, is entirely reflective of, and focused on, the insurance industry. *Accord Elliot,* 337 F.3d at 1145 (in analyzing a state law under *Miller,* asserting that the state law satisfies *Miller's* first prong because the state law "by its very terms is directed at insurance, and contains provisions applicable only to insurance companies."); *Colligan v. UNUM Life Ins. Co. of Am.,* 2001 WL 533742, at *3 (D.Colo. April 23, 2001) (in denying an insurer's motion to dismiss on ERISA preemption grounds a Colorado insurance bad faith claim, concluding that "Colorado's bad faith cause of action is clearly distinguishable from the Mississippi cause of action at issue in *Pilot Life*").

Moreover, contrary to the exclusivity standard posited by the majority, *even if* there existed de minimus exceptions to Colorado's exclusive application of insurance bad faith tort law to the insurance context, such exceptions would not preclude the Colorado law from falling within ERISA's savings clause. The Court noted in *Miller* noted [sic] that "Petitioners maintain that the application to noninsuring HMOs forfeits the laws' status as 'law[s] . . . which regulat[e] insurance.' § 1144(b)(2)(A)." ___ U.S. at ___ n. 1, 123 S.Ct. at 1476 n. 1 The court responded: "We disagree . . . . petitioners' argument is foreclosed by *Rush* [ ] where we noted that Illinois' independent-review laws contained '*some overbreadth* in the application of [the Illinois statute at issue] beyond orthodox HMOs,' yet held that '*there is no reason to think Congress would have meant such minimal application to noninsurers to remove a state law entirely from the category of insurance regulation saved from preemption.*'" *Id.* (quoting *Rush,* 536 U.S. at 372, 122 S.Ct. 2151) (emphasis supplied) (internal citation omitted). For these reasons, it is clear that Colorado's insurance bad faith law is "specifically directed toward entities engaged in insurance." *Miller,* ___ U.S. at ___, 123 S.Ct. at 1479.

b. "Substantially affect the risk pooling arrangement between the insurer and the insured"

The majority also concludes that Colorado's insurance bad faith law fails *Miller's* second prong, which requires that for a state law to qualify as regulating insurance, it must "substantially affect the risk pooling arrangement between the insurer and the insured." *Id.* To arrive at this conclusion, the majority relies heavily on *Pilot Life, Kelley*

v. Sears, Roebuck & Co., 882 F.2d 453 (10th Cir.1989), ("The Kidneighs fail to overcome *Kelley's* precedential value in this case."), and a number of other circuit court cases applying *Pilot Life*.

However, notwithstanding the majority's assertions that because *Pilot Life* has not been completely overruled and that *Pilot Life* and its progeny in this circuit are therefore binding, those authorities' precedential value on the *precise* issue of the "substantially affect" prong has been seriously eroded, if not eviscerated, by *Miller*. On this issue, the Court in *Miller* decidedly did *not* favorably cite to *Pilot Life*. Indeed, as another circuit court recently put it in assessing *Pilot Life's* conclusions regarding risk, "subsequent case law puts the validity of . . . these *Pilot Life* conclusions into some doubt." *Elliot,* 337 F.3d at 1144.

A comparison between the rule from *Pilot Life* and the new standards suggested by recent Supreme Court cases and expressly adopted in *Miller* shows how *Pilot Life's* risk allocation analytical framework has been displaced by subsequent Supreme Court decisions. The Court in *Pilot Life* concluded that a claim brought under Mississippi common law for tortious breach of an insurance contract was "not saved by § 514(b)(2)(A)," and was therefore foreclosed by ERISA direct preemption. 481 U.S. at 57, 107 S.Ct. 1549. In so holding, the Court emphasized that the Mississippi common law claim at issue was "firmly planted in the general principles of Mississippi tort and contract law," *id.* at 50, 107 S.Ct. 1549, reasoning that "the common law of bad faith does not define the terms of the relationship between the insurer and the insured; it declares only that, whatever terms have been agreed upon in the insurance contract, a breach of that contract may in certain circumstances allow the policyholder to obtain punitive

damages," *id.* at 51, 107 S.Ct. 1549, and stressing that "the Mississippi common law of bad faith does not effect a spreading of shareholder risk." *Id.* at 50, 107 S.Ct. 1549.

Miller, in contrast, specifically disavowed the McCarran-Ferguson factors, including the test of "whether the practice has the effect of transferring or spreading a policyholder's risk," the test relied on in *Pilot Life,* 481 U.S. at 48, 107 S.Ct. 1549, and in *Kelley,* 882 F.2d at 456 ("Colorado's common law of bad faith does not regulate insurance. It neither spreads policyholder risk nor controls the substantive terms of the insurance contract. *See Pilot Life.*"). The Court in *Miller* stated: "[O]ur test requires *only* that the state law substantially *affect* the risk pooling arrangement between the insurer and the insured; it does *not* require that the state law actually *spread* risk." ___ U.S. at ___ n. 3, 123 S.Ct. at 1477 n. 3 (all but second emphasis supplied). Perhaps animated by federalism concerns, *Miller* expanded the scope in ERISA direct preemption analysis as to what affects risks. The Court's use of the word "only" to describe the new test shows that "[s]ubstantially affect[ing] the risk pooling arrangement between the insurer and the insured" is likely an easier hoop to jump through. *See Elliot,* 337 F.3d at 1145 (stating that *Ward* and *Miller* "leave open the possibility that risk spreading might be found in a *much wider variety* of statutes than *Pilot Life* suggested") (emphasis supplied). *Miller* is the culmination, so far, of a clear trend by the Supreme Court to rein in ERISA direct preemption. *Ward* and *Rush,* the two ERISA direct preemption cases decided immediately prior to *Miller,* each concluded that the risk analysis did not justify ERISA direct preemption, as did *Miller* itself.

In *Ward,* 526 U.S. 358, 119 S.Ct. 1380, 143 L.Ed.2d 462, decided in 1999, the Court held that California's notice-prejudice rule, under which an insurer could not deny benefits due to an insured's late notice without showing that the insurer suffered prejudice, fell within ERISA's savings clause. In so holding, the Court reasoned that "the rule controls the terms of the insurance relationship" and is directed at the insurance industry. *Id.* at 368, 119 S.Ct. 1380.

In *Rush,* 536 U.S. 355, 122 S.Ct. 2151, 153 L.Ed.2d 375, decided in 2002, the Court held that an Illinois law mandating a binding review by an independent physician following an insurer's refusal to pay for surgery fell within the savings clause. The Court in *Rush* reasoned that "this effect of eliminating an insurer's autonomy to guarantee terms congenial to its own interests is the stuff of garden variety insurance regulation through the imposition of standard policy terms." *Id.* at 387, 122 S.Ct. 2151.

Miller, decided unanimously earlier this year, analyzed whether Kentucky's "Any Willing Provider" ("AWP") statutes fell within ERISA's savings clause. The AWP statutes required health insurance plans to provide access to the plans' network to all health care providers in the plans' geographic coverage region willing to meet insurer's participation requirements. *See Miller,* ___ U.S. at ___-___, 123 S.Ct. at 1473-74 (summarizing Ky.Rev.Stat. Ann. § 304.17A-270). *Miller* was the Court's first-*ever* application of the "substantially affects" version of the risk prong. Holding that the AWP statutes satisfied the risk prong, the Court stated that the "rule [that] governs whether or not an insurance company must cover claims submitted late, which dictates to the insurance company the conditions under which it must pay for the risk that it has assumed

. . . . certainly qualifies as a substantial effect on the risk pooling arrangement between the insurer and insured." *Id.* at 1478 n. 3.

If, contrary to the Supreme Court's teachings discussed earlier, it was necessary to address this matter, I would hold that Colorado's insurance bad faith law fits within this unbroken line of recent Supreme Court cases as sufficiently affecting the pooling of risk to qualify as a regulation of insurance. As amended in 1987,[2] Colorado statutory law requires that insurers attempt to settle when liability becomes reasonably clear, and forbidding insurers from offering less than what a reasonable person would feel entitled to, Colorado's insurance bad faith law "substantially affects the risk-pooling arrangement." Even without the additional remedies foreclosed by ERISA conflict preemption, it tends to make it less likely that insureds will suffer from delayed settlement.

Colorado's law effects this alteration of risk by making *clear* that such behavior may yield liability against the insurer, presumably altering the insurer's incentives to play the "delay game" and drive down settlement amounts. By mandating that insurers attempt to settle when liability becomes reasonably clear and barring insurers from

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[2] The fact that the Colorado legislature passed the amendment at issue in this case in 1987 is an additional reason that *Kelley,* contrary to the majority's assertions, does not control. Though decided by this court in 1989, *Kelley* involved a claim brought under the Colorado bad faith statute as it stood prior to the important amendments enacted in 1987 to Colorado's insurance bad faith statutory law. *See Kelley,* 882 F.2d at 455 ("[*Kelley*] . . . asserted causes of action under Colorado's common law of bad faith insurance practices and Colo.Rev.Stat. § 10-3-1104 (1973)").

offering less than what a reasonable person would feel entitled to, Colorado's insurance bad faith law "dictates to the insurance company the conditions under which it must pay for the risk it has assumed." *Miller,* ___ U.S. at ___ n. 3, 123 S.Ct. at 1477 n. 3. *Accord Elliot,* 337 F.3d at 1145 (noting that Supreme Court decisions subsequent to *Pilot Life* "call[ ] into question *Pilot Life's* conclusion that a claim processing law does not affect risk allocation"). The greater likelihood of the imposition of liability for bad faith behavior makes bad behavior more costly. As the cost of bad behavior rises, behavior tends to change. The statute thus changes the conditions under which an insurer will "pay for the risk that it has assumed," *Miller,* ___ U.S. at ___ n. 3, 123 S.Ct. at 1478 n. 3, by making the law decisively clear that the risk of nonperformance in settlement negotiations lies with the insurer.

Colorado's insurance bad faith law thus substantially affects the risk-pooling arrangement by giving insureds clear protection they did not previously possess in their settlement negotiation practices with insurers. Because this law satisfies both of the requisite elements to qualify as "regulating insurance," it thus falls with ERISA's savings clause.

CONCLUSION

ERISA was enacted as a balanced statute, offering certain protection to insurers while securing protection for insured patients who are at their most vulnerable when they suffer medical harm. Through the insurance savings clause, Congress specifically authorized the states to continue regulating the business practices of insurance companies. State regulation of insurance is an undeniably

proper state function that permits states to respond to the specific aspects of their policy problems better than the one-size-fits-all approach the majority's reading emphasizes. The majority's approach helps dismantle the protective system devised by Colorado's legislature and courts for Colorado's citizens.

Because, under binding precedent of the Supreme Court and this court, Mr. Kidneigh's claim is foreclosed by ERISA conflict preemption, I respectfully concur in the majority's disposition of this case. However, I do not join the majority's ERISA direct preemption analysis because, for the reasons detailed above, it is both unnecessary and probably incorrect as a matter of law.

APPENDIX B

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 02-Z-210

JON F. KIDNEIGH and BARBARA KIDNEIGH,

Plaintiffs,

vs.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT
(Hearing on Motion to Dismiss)

(Filed Jun. 19, 2002)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 2:44 p.m., on the [sic] May 1, 2002, in Courtroom C-400, United States Courthouse, Denver, Colorado.

APPEARANCES

STEPHEN C. KAUFMAN, Attorney at Law, 3801 East Florida Avenue, Suite 900, Denver, Colorado, 80120, and NEVIN A. SEGER, Attorney at Law, 1080 Kalamath Street, Denver, Colorado 80104, appearing for the plaintiffs.

JACK M. ENGLERT, JR., Attorney at Law, 555 17th Street, Suite 3200, Denver, Colorado, 80202, appearing for the defendant.

* * *

[24] insurance policies in California; therefore, it regulated insurance.

In Colorado, in this case, the existence of a bad faith claim has no effect on the terms and conditions of the policy. It does not alter the way the policy operates. But if the policy is found to have been breached, given the right circumstances, it may increase the damages. But that doesn't have any effect on the terms.

I agree with *Ward*. I don't think *Ward* changes the law. And I think that under *Ward* and all the other Supreme Court precedent, our decision – our analysis is the correct one, your Honor.

THE COURT: It would be very helpful if we had some better law from the circuit on some of these points.

MR. ENGLERT: I agree. Thank you.

THE COURT: Thank you.

RULING

THE COURT: Well, I think reading the decisions of the various judges other than myself has been helpful. And certainly, there is certainly a strong argument, as made by, for example, Judge Matsch in his decision, that this claim, this bad faith claim, is not preempted.

I wish we had some better directive, circuit law, telling us whether this type of claim falls under *Pilot Light* [*sic*] or falls under *Ward*, and unfortunately, we don't.

[25] My conclusion after hearing the arguments is that the motion to dismiss the bad faith claim will be denied based on the indication which appears to be – which appears to apply – it may not, but it appears to apply in the *Ward* case and the decisions of several of us who sit on this bench – my decision, Judge Kane's, Judge Matsch's, Judge Daniel's, which all have allowed bad faith claims to proceed despite ERISA.

I wish some of these had been appealed. I wish we had some clear direction from the Tenth Circuit. Unfortunately, we don't. These colleagues of mine are scholarly people. And as recently as January of 2002, Judge Wiley Daniel found no preemption.

So the court's decision on this motion to dismiss will be that it should be denied, and the bad faith claim should go forward, will not be dismissed.

Now, I still have problems with the consortium claim because I'm not at all sure that the consortium claim can be lumped in with the bad faith claim when we do have a Tenth Circuit decision, which I handed to somebody – do you still have it there?

MR. KAUFMAN: I have it.

THE COURT: I'll have Jeannette bring it back up to me – where we have the Tenth Circuit indicating in *Pacificare of Oklahoma*, which is cited as 59 F.3d 151, 1995, Tenth Circuit. And it's Judge Anderson, who speaks for himself, and [26] Judges Brorby and Henry and who pretty well says a loss of consortium claim against an HMO alleging negligent or fraudulent administration of the plan is preempted and then goes on to talk about the vicarious liability for wrongful death.

It appears to me that this case falls within that type of claim, which is, indeed, preempted; and I see no reason to lump together the bad faith and consortium and say that they both have to be decided the same way.

Based on the case, *Pacificare*, and the fact that I think it probably does apply to the allegations here, the Court will grant the motion to dismiss the consortium claim; and this case will go forward to trial, or at least to the point of motions for summary judgment, on the first claim and the second claim, but the third claim is dismissed.

Now, we don't have a trial date on this yet. And even though the case that was argued before the Tenth Circuit was in March, it would seem to me that there might be some chance that when the Tenth Circuit comes down with their opinion they could give some help to us on this case, even though that was Wyoming law and this is Colorado law.

So when you folks set your trial – or have you a trial date?

MR. KAUFMAN: No, your Honor.

THE COURT: You don't have it yet. Well, may I ask [27] this: If either side hears something from the Tenth Circuit, would you be kind enough to let me know through my staff, either Beth Appleton, my law clerk, or Jeannette Gallardo, my courtroom deputy, what has been decided by the Tenth. It may or may not have any effect on this case, but I would be interested.

So I'd appreciate it if you let me know, unless I see it before you do.

The magistrate judge that you folks have is a very good one for settling cases, Judge Schlatter. And I would strongly urge that – Apparently Mr. Kidneigh is doing well now; is that correct?

MR. KAUFMAN: Well, he's doing much better than what he was doing. He still has residual problems, but he's doing better.

THE COURT: So it may be that there may be room for some sort of resolution of these claims. If you can, please try to resolve it and let me know through my staff.

If you think you want to try to take this to the Court of Appeals and have something decided definitively by them, then do that, too.

Otherwise, we'll get a trial date on this and it will go to trial on whatever claims remain by that date.

Do you have a settlement conference set before Judge Schlatter? Do you know that?

[28] *MR. KAUFMAN:* Your Honor, we just filed the case basically a month or six weeks ago, or something like that, so we have –

THE COURT: Okay. 2002 case.

MR. KAUFMAN: We have our scheduling conference next week.

THE COURT: Okay. Well, my urging to you folks – you've had a scheduling conference, though, haven't you?

MR. KAUFMAN: No, your Honor. Next – May 7, we have the scheduling conference.

THE COURT: When you meet for the scheduling conference, you might want to talk together and see about setting a settlement conference. Otherwise, we'll give you a trial date right after you get your pretrial order in place.

Anything further on the record before we recess this case? We've got another one coming up.

MR. KAUFMAN: No, your Honor.

MR. ENGLERT: No, your Honor.

THE COURT: Okay. The Court will be in recess very briefly, and then we'll call up the next case, which is Hobleman.

(Recess at 3:30 p.m.)

* * *

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JON F. KIDNEIGH, Plaintiff – Cross-Appellee, and BARBARA KIDNEIGH, Plaintiff – Appellant – Cross-Appellee, v. UNUM LIFE INSURANCE COMPANY OF AMERICA, a Maine corporation, Defendant – Appellee – Cross-Appellant. COLORADO TRIAL LAWYERS ASSOCIATION, Amicus Curiae.	Nos. 02-1277 & 02-1282

ORDER

Filed October 28, 2003

Before **KELLY, HENRY** and **HARTZ**, Circuit Judges.

Appellant/Cross-Appellees' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: /s/ Jeanne
Deputy Clerk